Supreme Court, U.S.
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No. 97-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
GARY VIKEN, SECRETARY OF REVENUE,
Petitioners,

v.

UNITED STATES OF AMERICA, ON BEHALF OF THE CHEYENNE RIVER SIOUX TRIBE AND ITS MEMBERS,
AND
CHEYENNE RIVER SIOUX TRIBE,
AND
DEWEY COUNTY, SOUTH DAKOTA, JOHN ALLEY, COUNTY TREASURER, ZIEBACH COUNTY, SOUTH DAKOTA, VIRGINIA HERTEL, COUNTY TREASURER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STEVEN C. EMERY*
TRIBAL ATTORNEY GENERAL
THOMAS J. VAN NORMAN
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-6687

**Counsel of Record*

STEVEN J. GUNN
INDIAN LAW RESOURCE CENTER
601 E Street, SE
Washington, D.C. 20003
(202) 547-2800

BRIAN S. KOUKOUTCHOS
9 Avon Road
Bedford, MA 01730
(617) 275-4900
Of Counsel

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTION PRESENTED

Should this Court revisit its rulings in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976), that states may not tax motor vehicles owned by Indian tribal members living in Indian country?

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STATUTORY PROVISION

S.D. Codified Laws Ann. § 32-5B-1. Imposition of Tax -- Rate -- Failure to pay as misdemeanor.

In addition to all other license and registration fees for the use of the highways, a person shall pay an excise tax at the rate of three percent on the purchase price of any motor vehicle, as defined by § 32-3-1, purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state. The tax shall be in lieu of any tax levied by chapters 10-45 and 10-46 on the sales of such vehicles. Failure to pay the full amount of the excise tax is a Class 1 misdemeanor.

STATEMENT OF THE CASE

The issue here is whether this Court should revisit its rulings in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976), that states may not tax motor vehicles owned by Indians living in Indian country. Although petitioners protest to the contrary, both courts below recognized that South Dakota's motor vehicle excise tax is identical in all relevant respects to the motor vehicle taxes struck down in those cases. The only way this Court can grant the relief petitioners seek is to revisit and reverse its decisions in those cases, including its unanimous decision in *Sac and Fox* rendered only four years ago. Review by this Court is not warranted.

Respondent Cheyenne River Sioux Tribe will not repeat petitioners' statement of the case; rather, the Tribe will clarify and supplement the issues raised by petitioners, correcting inaccuracies in their statement.

A. South Dakota's Motor Vehicle Excise Tax.

The State of South Dakota levies an excise tax on motor vehicles owned by state residents. S.D. Codified Laws Ann. § 32-5B-1. The excise tax is an *ad valorem* tax assessed at the rate of three percent of vehicle value. *Id.* The tax is collected only once, at the time of initial registration or application for title, *id.* at § 32-5B-10, by the treasurer of the county in which the vehicle owner resides, *id.* Payment of the tax is a prerequisite to vehicle registra-

tion and the issuance of vehicle titles.[1] *Id.* at § 32-5B-14. All tax proceeds are dedicated to the state highway fund. S.D. Const., Art XI, § 8; S.D. Codified Laws Ann. § 32-5B-17.

The tax is not assessed on nonresidents who drive their vehicles through the state, *id.* at § 32-3-5, or who purchase vehicles in the state. Nor is it assessed on new residents who previously paid a similar tax in another state. *Id.* at § 32-5B-11.

B. The State's Taxation Of Reservation Indians.

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe with sovereign authority over the Cheyenne River Indian Reservation in South Dakota. The Cheyenne River Indian Reservation was established in 1889, Act of March 2, 1889 (25 Stat. 888), and its boundaries have not been diminished. *See South Dakota v. Bourland*, 508 U.S. 679 (1993); *Solem v. Bartlett*, 465 U.S. 463 (1984). The reservation encompasses at least 2.8 million acres of land in north-central South Dakota, *see*, *e.g.*, *Solem*, 465 U.S. at 466 n.6, and is almost as large as Connecticut. The Reservation is comprised of, and wholly includes, Dewey and Ziebach Counties and is home to approximately 11,813 Indians. U.S. Dept. of Interior, Bureau of Indian Affairs, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES 1 (1995).[2]

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[1] A state certificate of title is needed for the lawful operation or possession of a vehicle in the state, S.D. Codified Laws Ann. § 32-3-12, and for the lawful sale or resale of a vehicle in the state, *id.* at §§ 32-3-13 (sale), 32-3-7 (resale).

[2] Indians account for 66%, or essentially two-thirds, of the total (continued...)

Since at least 1986, the State has collected its motor vehicle excise tax from tribal members living on the Cheyenne River Indian Reservation. Tribal members drive primarily on the reservation, but the State requires them to have valid South Dakota license plates when they drive off the reservation. Tribal members cannot obtain state plates without paying the entire excise tax. The State does not tailor the amount of the tax to the amount of actual off-reservation vehicle use.

The State requires tribal members to pay the excise tax regardless of where they purchase their motor vehicles. The State has allowed no exemption for tribal members who purchase their vehicles on the reservation. There are two car dealerships on the reservation, and on-reservation vehicle sales to tribal members are commonplace. *See, e.g.*, C.R.S.T. App. No. 30 at 56.[3]

Although the Tribe and many of its members have objected to the State's taxation, *see* C.R.S.T. App. Nos. 33, 34, 38, 39, 41, 50, tribal members have paid the State's taxes because they knew they would face civil and criminal penalties for driving off-reservation without state license plates and registration stickers.[4]

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[2](...continued)
reservation population. U.S. Dept. of Commerce, Bureau of the Census, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, SOUTH DAKOTA 424-25 (1993).

[3] "C.R.S.T. App." refers to the Tribe's appendix in the court of appeals.

[4] Operating a motor vehicle without paying the state excise tax is a class 1 misdemeanor. S.D. Codified Laws Ann. § 32-5B-1. Operating (continued...)

Petitioners' assertion that tribal law required tribal members to pay the State's excise tax, Pet. 11, is unfounded. Petitioners point to tribal resolutions in effect from 1987 to 1994 which incorporated substantive state traffic law provisions by reference, but those laws did not require Indians to pay state taxes.

Petitioners ignore tribal laws and practices which actually addressed state taxation by affirmatively claiming immunity for reservation Indians. From the early 1980's through the present, the Tribe has repeatedly demanded that the State "cease its taxation of reservation Indians' motor vehicles, so that the tribal government could exercise its own authority in this area." C.R.S.T. App. No. 34 at 3. The Tribe made these demands through Tribal Council resolutions, Chey. R. Sx. Tr. Res. Nos. 26b-82-CR (1982), 141-88-CR (1988), 9-91-CR (1991), *reprinted in* C.R.S.T. App. No. 50, and in meetings between tribal and state officials, tribal requests to the Governor's office, and requests for favorable legislation in the State Legislature, C.R.S.T. App. No. 34 at ¶¶ 14-27. In 1992, after these repeated efforts failed, the United States initiated the present lawsuit, and in 1993, the Tribe intervened. Finally, in 1994, the Tribe enacted its own motor vehicle license, registration, and tax laws and again expressed its longstanding position that "federal law and the doctrine of tribal sovereignty bar state authority to tax Indian owned motor vehicles within the

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[4](...continued)
a motor vehicle without state license plates is a class 2 misdemeanor. *Id.* at § 32-5-98. Operating a motor vehicle without a state certificate of registration is a civil petty offense. *Id.* at § 32-5-91. Indians driving off-reservation have, in fact, been subject to arrest under these provisions. *See, e.g., State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), *cert. denied* 500 U.S. 928 (1991).

Reservation." Chey. R. Sx. Tr. Ord. Nos. 63 at § 1(4), 64 at § 1(4); *reprinted in* C.R.S.T. App. Nos. 48, 49. Clearly, tribal law did not authorize state taxation.

C. The State's Infringement On Tribal Self-Government And Self-Determination.

The State's taxation of Indian-owned motor vehicles impedes its efforts to develop its reservation economy. Economic conditions on the Cheyenne River Indian Reservation are bleak; the majority of reservation residents live in poverty.[5] The only way for the Tribe to lift its people out of poverty is to develop its reservation economy. However, substandard road conditions thwart tribal economic development initiatives.[6]

In 1994, the Tribe enacted its own motor vehicle tax laws in order to raise revenue to develop the transportation infrastructure on the reservation. Chey. R. Sx. Tr. Ord. Nos. 63, 64; *reprinted in* C.R.S.T. App. Nos. 48, 49. These laws were approved by the U.S. Secretary of Interior. *Id.* Once implemented, they will allow the Tribe to construct

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[5] Ziebach and Dewey counties are the seventh (7th) and twenty-ninth (29th) poorest counties in the United States, with poverty rates of 51.1% and 44.4%, respectively. U.S. Dept. of Commerce, Bureau of the Census, THE 100 POOREST COUNTIES IN THE UNITED STATES, CPH-L-184 (1990). Among reservation Indians, the unemployment rate ranges from 60 to 90%. Chey. R. Sx. Tr. Ord. No. 64 §1(2) (legislative finding); *reprinted in* C.R.S.T. App. No. 49.

[6] *See* H.R. Rep. No. 102-171(I), 102nd Cong., 1st Sess. at 33 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1559 ("Substandard conditions on many reservation roads and bridges has a chilling effect on efforts to improve economic and educational opportunities for Native Americans").

tribal roads and maintain them in a good and safe condition. This, in turn, will pave the way for economic development on the reservation:

> having an increased ability to prioritize and implement [tribal] highway projects will increase the Tribe's opportunities for economic development on [the] reservation. . . . [I]nfrastructure to attract companies . . . is critical to the Tribe's welfare and [its] ability to maintain [its] self-government. C.R.S.T. App. No. 36 at ¶¶ 15-16.

The State's taxation of tribal members prevents implementation of the tribal system because tribal members cannot afford to pay both state and tribal motor vehicle taxes. C.R.S.T. App. No. 36 at ¶ 17. The State's unauthorized taxation thus "infringes on [the Tribe's] right to self-government." *Id.*

D. Reservation Roads.

The Bureau of Indian Affairs (B.I.A.) has constructed and now maintains nearly 300 miles of roads on the Cheyenne River Indian Reservation. These roads provide the only access to numerous areas on the reservation, including isolated communities with highly-concentrated Indian populations. C.R.S.T. App. Nos. 12 at ¶ 12, 40 at ¶ 7. The State does not contribute to the construction or maintenance of these roads. C.R.S.T. App. No. 13 at ¶ 19.

The State maintains state highways and roads that traverse the reservation. The construction of those highways

is funded primarily by the federal government.[7]

The Tribe, contrary to petitioners' assertions, Pet. 10 n.10, does contribute to the maintenance of roads on the reservation. For example, in 1994, tribal expenditures for road maintenance were $99,000. C.R.S.T. App. No. 21 at 2. However, the Tribe's ability to fund road programs is severely limited by the State's taxation of tribal members. So, too, is the Tribe's ability to develop reservation road programs that meet the unique needs of tribal members.

E. The Proceedings Below.

With two exceptions,[8] the Tribe does not object to

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[7] In fiscal year 1992, for example, the State received approximately $10.65 million in federal funds for road construction contracts on the Cheyenne River Indian Reservation. *See* C.R.S.T. App. No. 15 at 6; *see also* 23 U.S.C. § 204 (federal funding for state highways on Indian reservations); 23 U.S.C. § 202 (federal offset for "nontaxable Indian lands" within state).

[8] First, the Tribe objects to petitioners' suggestion that the court of appeals found that tribal law, not state law, compelled tribal members to pay the State's excise tax. Pet. 11, *quoting* App. 5-6. ("App." refers to the appendix to the petition for writ of certiorari.) In fact, the court ruled that tribal law *did not* require tribal members to pay state taxes. The court ruled that although tribal law incorporated "certain provisions of the South Dakota traffic code, including the requirement that vehicles bear valid state license plates," App. 19, it did not "address[] the payment of the state excise tax or suggest[] that its collection from tribal members was valid," *id*. To the contrary, the court found, "[t]he tribal council has consistently protested the imposition of state motor vehicle taxes on its members. . . ." *Id*. Second, the Tribe disagrees with petitioners' assessment, curiously set forth in their statement of the case, Pet. 13-14, that the court of appeals "made three errors in its analysis," Pet. 13. As explained below, the court of appeals properly applied this Court's controlling precedents.

petitioners' characterization of the proceedings below. The district court ruled that South Dakota's motor vehicle excise tax is a personal property tax and, as such, it may not lawfully be applied to tribal members living on the Cheyenne River Indian Reservation. App. 36. The court of appeals affirmed, App. 13, and remanded for further development of the record in order to "determine whether damages should be awarded," App. 20, to compensate tribal members for past excise taxes unlawfully collected by the State. Petitioners filed a request for rehearing *en banc*, which was denied. Petitioners now seek review by this Court.

REASONS FOR DENYING THE WRIT

I. The Only Way This Court Can Grant The Relief Petitioners Seek Is To Reverse Its Rulings In Three Cases, Including Its Unanimous Ruling In *Sac And Fox* (1993), That States May Not Tax Motor Vehicles Owned By Reservation Indians.

American Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Although they accepted "the protection of the United States of America" through treaties, *see, e.g., Treaty with the Teton*, 1815, Art. 3 (7 Stat. 125), *reprinted in* II Kappler 112, Indian tribes retain the sovereign status of "domestic dependent nations," *Oklahoma Tax Comm'n v. Potawatomi*, 498 U.S. 505, 509 (1991); *accord Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and continue to "'possess[] attributes of sovereignty over both their members and their territory,'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.)

515, 557 (1832).

Indian tribes have a government-to-government relationship with the United States, *see*, *e.g.*, 25 U.S.C. §§ 3601(1), 3701(1); Executive Memorandum, 59 Fed. Reg. 22951 (April 29, 1994), but they are in no way "dependent on" or "subordinate to" the states. *Colville*, 447 U.S. at 154. As a general rule, reservation Indians are subject only to federal and tribal law, not state law. *Williams v. Lee*, 358 U.S. 217 (1959). This is especially true in the area of taxation:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territories.

Montana v. Blackfeet, 471 U.S. 761, 764 (1985) (citations omitted).

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), Chief Justice John Marshall reminds us that "the power to tax involves the power to destroy." This Court has long recognized that, if permitted, state taxation of Indian tribes and their members would "essentially destroy[]" tribes by depriving them of their tax base. *Bryan v. Itasca County*, 426 U.S. 373, 388-89, n.14 (1976). Thus, "'[i]n the special area of state taxation of Indian tribes and tribal members,'" this Court has adopted "'a *per se* rule,'" *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 267 (1992) (quoting *California v. Cabazon Band*

of Mission Indians, 480 U.S. 202, 215 n.17 (1987)): "'such taxation is not permissible absent congressional consent,'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (citing *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171 (1973).

"Taking this categorical approach, [this Court has] held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995), including state income taxes, *McClanahan*, 411 U.S. at 165-81; *Sac and Fox*, 508 U.S. at 123-26, real property taxes, *United States v. Rickert*, 188 U.S. 432 (1903); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), personal property taxes, *see, e.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 375 (1976), sales taxes, *Moe*, 425 U.S. at 475-481, *Potawatomi*, 498 U.S. at 507; *Dep't of Taxation and Finance of New York v. Attea & Bros.*, 512 U.S. 61, 64 (1994), transaction taxes, *County of Yakima*, 502 U.S. at 268, vendor taxes, *Chickasaw Nation*, 515 U.S. at 459-62; *Moe*, 425 U.S. at 480-81, use taxes, *Mescalero Apache Tribe*, 411 U.S. at 158, mineral royalty taxes, *Montana v. Blackfeet Tribe*, 471 U.S. at 764-66, and hunting and fishing license fees, *see Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942).

Three times, this Court has applied its *per se* rule against unauthorized state taxation in Indian country to strike down state taxes on Indian-owned motor vehicles. *Sac and Fox*, 508 U.S. at 127-28 (1993); *Colville*, 447 U.S. at 163 (1980); *Moe*, 425 U.S. at 480-81 (1976). In the case at bar, the Eighth Circuit Court of Appeals merely applied these controlling precedents, as it was bound to do.

A. South Dakota's Excise Tax Is Identical In All Relevant Respects To The Motor Vehicle Taxes Struck Down In *Moe*, *Colville*, And *Sac And Fox*.

The court of appeals correctly held that South Dakota's motor vehicle excise tax "resembles the personal property taxes found to be preempted in *Moe*, *Colville*, and *Sac and Fox*." App. at 12. Indeed, South Dakota's tax is identical in all relevant respects to those taxes.

In *Moe*, 425 U.S. 463 (1976), the first case in the Court's trilogy of Indian motor vehicle tax cases, the Court invalidated a personal property tax imposed by the State of Montana on motor vehicles owned by members of the Confederated Salish and Kootenai Tribes living on the Flathead Reservation. *Id.* at 475-481. The property tax at issue in *Moe* was "assessed annually at a percentage of market value." *Colville*, 447 U.S. at 163 (explaining *Moe*); *see also Confederated Salish & Kootenai Tribes v. Montana*, 392 F.Supp. 1325, 1326 (D. Mont. 1975) (three judge court). Payment of the taxes was required for vehicle registration, *Moe*, 425 U.S. at 469; *Confederated Salish & Kootenai Tribes*, 392 F.Supp. at 1326, and the State imposed the tax on vehicles used both on and off the reservation, *see Colville*, 447 U.S. at 163 & n.30 (explaining *Moe*); *Confederated Salish & Kootenai Tribes*, 392 F.Supp. at 1328-29 (Smith, J., concurring in part and dissenting in part).

Four years later, in *Colville*, 447 U.S. 134 (1980), the Supreme Court enjoined the State of Washington from imposing an excise tax on motor vehicles, mobile homes, campers, and travel trailers owned by tribal members living on the Colville Reservation. *Id.* at 163. Like the personal property tax struck down in *Moe*, Washington's excise tax

was assessed annually and based on a percentage of vehicle value. *Colville*, 447 U.S. at 142-43, 163. Similarly, payment of the tax was required for vehicle registration, *id.* at 142-143, 163-164, and the State sought to impose the tax "upon vehicles owned by the Tribe or its members and used both on and off the reservation," *id.* at 162.

The *Colville* Court found that "the only difference" between Washington's excise tax and the tax struck down in *Moe* was its name and alleged purpose. 447 U.S. at 163. Whereas the tax in *Moe* was labeled a "personal property tax," 425 U.S. at 480, Washington's tax was called an "excise tax" and was imposed for "the privilege of using the vehicle in the State," *Colville*, 447 U.S. at 163; *see also id.* at 142-43. The Court attached no significance to this difference and dismissed the State's argument that its excise tax was permissible because the taxable event was vehicle use within the State:

> We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under this rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

Id. at 163-64. The Court held that Washington's excise tax was no different than the property tax struck down in *Moe*. *Id.* at 163.

South Dakota's motor vehicle excise tax is virtually identical to the taxes struck down in *Moe* and *Colville*. It is a tax on vehicle ownership, imposed only on state residents, S.D. Codified Laws Ann. § 32-5B-1, and based on a percentage of vehicle value, *id.* at §§ 32-5B-1, 32-5B-4. Payment of the tax is a prerequisite to vehicle registration, *id.* at § 32-5B-1, and the issuance of state certificates of title, *id.* at § 32-5B-14, and the State imposes the tax on vehicles driven both on and off the reservation. It is true that, unlike the taxes struck down in *Moe* and *Colville*, South Dakota's excise tax is not applied annually, but neither was the excise tax found invalid in *Sac and Fox*. 508 U.S. at 126. A state has no more authority to impose a one-time tax on Indian-owned vehicles than it does to impose a recurring tax.

In *Sac and Fox*, 508 U.S. 114 (1993), the Court's most recent Indian motor vehicle tax case, the Court invalidated an excise tax imposed by the State of Oklahoma on vehicles owned by members of the Sac and Fox Nation living in Indian country. *Id.* at 127-28. Oklahoma's excise tax was a one-time assessment calculated as a percentage of vehicle value. *Id.* at 119. It was "imposed for [vehicle] use both on and off Indian country," *id.* at 127, and payment of the tax was a prerequisite for vehicle registration and the issuance of state certificates of title, *id.* at 119. The Court held that Oklahoma's tax "strongly resemble[d]" the taxes struck down in *Moe* and *Colville* and, therefore, enjoined its application to tribal members living in Indian country. *Id.* at 127.

South Dakota's motor vehicle excise tax is identical in all relevant respects to the Oklahoma excise tax struck down in *Sac and Fox*. Both taxes are collected only once, at the time of initial registration or application for a state certificate of title. *Compare* Okla. Stat. Tit. 68, §

2103(A)(2) *and* S.D. Codified Laws Ann. § 32-5B-10. Both taxes are "calculated as a percentage of the vehicle's value." *See* 508 U.S. at 119. *Compare* Okla. Stat. Tit. 68, § 2103(A)(1) (excise tax levied at rate of three and one-fourth percent of vehicle value) *and* S.D. Codified Laws Ann. § 32-5B-1 (excise tax levied at rate of three percent of vehicle value). Both taxes are imposed on "the transfer and use of . . . vehicle[s]" in the state. *See Sac and Fox*, 508 U.S. at 126. *Compare* Okla. Stat. Tit. 68, § 2103(A)(1) (excise tax levied "upon the transfer of legal ownership of any vehicle registered in th[e] state and upon the use of any vehicle registered in th[e] state") *and* S.D. Codified Laws Ann. 32-5B-1 (excise tax imposed on transfer, by "purchase[] or acqui[sition]," of vehicles "use[d] on the streets and highways of th[e] state and required to be registered").[9] And both taxes are imposed on Indian-owned vehicles driven on and off Indian country.

Quite simply, *Sac and Fox* is on all fours with, and therefore controls, the case at bar.

B. Petitioners' Attempts To Distinguish *Sac And Fox* Are Futile.

Petitioners make several attempts to distinguish *Sac and Fox*. Pet. 21-24. All are fruitless. First, petitioners argue that South Dakota's excise tax is unlike Oklahoma's since its proceeds are "dedicated to the State Highway Fund," whereas the Oklahoma tax is used to generate undedicated, "general governmental revenue." Pet. 22. They are wrong.

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[9] South Dakota's excise tax applies to all transfers of ownership, not just purchases. *See* p. 21, n.17, *infra*.

Like South Dakota's excise tax, Oklahoma's excise tax provides funds for highway programs. By statute, part of the revenue from Oklahoma's excise tax is earmarked "for the maintenance and upkeep of the avenues of public access within th[e] state. . . ." Okla. Stat. Tit. 47, § 1103.

In *Sac and Fox*, this Court attached no significance to Oklahoma's dedication of excise tax revenue to highway programs. Instead, the Court summarily stated that the excise tax is used to "provide funds for 'general governmental functions,'" 508 U.S. at 119, and ruled that it was an unlawful tax on reservation Indians, *id.* at 127-28. Nothing in the Court's decision suggests that the purpose to which tax revenues are dedicated is a relevant, much less decisive, factor in determining whether or not a tax may be imposed on tribal members living in Indian country.[10]

Just as Oklahoma's dedication of tax revenue to highway programs was insufficient in *Sac and Fox* to grant the State jurisdiction to tax reservation Indians, so, too, is

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[10] Similarly, nothing in this Court's decisions supports petitioners' suggestion that "general revenue (not dedicated) is a property tax characteristic." Pet. 27. In *Sac and Fox*, this Court found that Oklahoma's excise tax was a property tax, notwithstanding the dedication of tax revenue to highway programs. And in *California v. Buzard*, 382 U.S. 386 (1966), this Court ruled that California's motor vehicle license fee, the proceeds from which were dedicated to highway programs, *id.* at 384, n. 8, *see also* Cal. Rev. & Tax. Code § 11001, *et seq.*, was a property tax and, as such, could not be imposed on nonresident military servicemen, *id.* at 394-395. (Federal law grants nonresident servicemen broad immunity from state property and income taxes. Soldiers' and Sailors' Civil Relief Act of 1940, *codified at* 50 U.S.C. App. § 574.) The *Buzard* Court found that California's license fee "serve[d] primarily a revenue interest, narrower in purpose but no different from taxes raised to defray the general expenses of government." 382 U.S. at 435.

South Dakota's similar dedication of tax revenue here. This Court has made clear that states may not acquire jurisdiction over reservation Indians by conferring benefits upon them. In *McClanahan*, the Court rejected Arizona's argument that it could tax the income of reservation Indians because it "expend[ed] tax monies for education and welfare" in Indian country. 411 U.S. at 173, n.12. The Court ruled that "'[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization,'" *id.*, *quoting The Kansas Indians*, 72 U.S. at 757.[11]

Second, petitioners argue that the instant case is distinguishable from *Sac and Fox* because the laws of the Cheyenne River Sioux Tribe required tribal members to pay the state excise tax. Pet. 22. First of all, the Eighth Circuit properly construed the Tribe's laws and rejected this argument. *See* page 7, n.8, *supra*. The Eighth Circuit's construction of tribal law is not "fairly included" in the question petitioners presented to this Court and, thus, is not properly before the Court. Sup. Ct. R. 14.1(a); *Izumi Seimitzu v. U.S. Philips Corp.*, 114 S.Ct. 425, 427 (1993).

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[11] The State of South Dakota is no doubt familiar with this principle, having twice been rebuked when it tried to bootstrap jurisdiction over reservation Indians on the basis that it was funding programs within Indian country. *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (rejecting State's argument that building and maintaining roads within Indian country conferred jurisdiction upon State over reservation roads), *cert. denied* 500 U.S. 915 (1991); *Valandra v. Veidt*, 259 N.W.2d 510, 513 (S.D. 1977) (rejecting State's argument that dedication of mobile home registration fees to highway programs within Indian country provided "basis for granting jurisdiction over Indian property on a reservation").

In any event, petitioners are wrong. Although tribal law incorporated certain state traffic law provisions between 1987 and 1994, it never required tribal members to pay state taxes. The Tribe merely adopted substantive state law provisions as tribal law, ceding no taxation authority or jurisdiction to the state.[12] In *Johnson v. Yellow Cab*, 321 U.S. 383, 391 (1944), this Court held that statutes, like the tribal laws at issue here, that incorporate the laws of another sovereign do not cede jurisdiction to that sovereign.[13]

Third, petitioners argue that *Sac and Fox* is not controlling because Oklahoma, unlike South Dakota, collects its excise tax in addition to a sales tax on motor vehicles. Pet. 23. Wrong again.

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[12] Given the supremacy of federal law under the Constitution, U.S. Const., Art. VI, the Tribe had every right to expect the State to comply with federal law, including the treaty-based immunity of Indians from state taxation. As state citizens, *see* Act of June 2, 1924, ch. 233 (43 Stat. 253), Indians are entitled to license and register their motor vehicles with the State, U.S. Const., Amend. XIV, § 1; F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 652 (1982 ed.) ("Tax exemptions are not a valid basis to deny rights or benefits to individual Indians."). Petitioners should have issued license plates and registration stickers to tribal members for administrative costs alone, without imposing state taxes as a precondition. This is the State's policy when licensing and registering vehicles owned by Indian tribes. S.D Codified Laws Ann. § 32-5-42.

[13] Even had the Tribe wanted to cede jurisdiction to the State, it could not have done so without congressional authorization. Immunity from state taxation is an aspect of tribal self-government and may be waived only with congressional consent. *Montana v. Blackfeet Tribe*, 471 U.S. at 764-65. Congress has never consented to state taxation of motor vehicles owned by Indians living in Indian country. The only general method Congress has provided whereby states may assume jurisdiction over reservation Indians is Public Law 280, *Washington v. Yakima Nation*, 439 U.S. 463, 470-71 & n.8 (1979), but states may not acquire taxation jurisdiction under Public Law 280, *Bryan*, 426 U.S. at 388.

Oklahoma, like South Dakota, collects its excise tax in lieu of, not in addition to, the state sales tax. Okla. Stat. Tit. 68, § 2106(a) (excise tax levied "in lieu of all other taxes on the transfer or first registration in th[e] state of vehicles," including state sales tax); *compare* S.D. Codified Laws Ann. § 32-5B-1 (excise tax levied "in lieu of" state sales tax). Like South Dakota, Oklahoma has a general sales tax statute, Okla. Stat. Tit. 68, § 1354[14]; *compare* S.D. Codified Laws Ann. § 10-45-1, *et seq.*, and like South Dakota, it exempts motor vehicle sales from the statute's coverage. Okla. Stat. Tit. 68, § 1355(B). Just as in South Dakota, motor vehicles purchased in Oklahoma are subject only to an excise tax. They are not subject to an additional sales tax. Okla. Stat. Tit. 68, § 2106(a); *Peterson v. Oklahoma Tax Comm'n*, 395 P.2d 388, 390, 392 (Okla. 1964) (excise tax, not sales tax, levied on sale of vehicles).[15]

Clearly then, this Court struck down Oklahoma's excise tax in *Sac and Fox* not because it resulted in "a dual imposition," as petitioners suggest, Pet. 23, but because it too closely resembled the taxes struck down in *Colville* and *Moe*.

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[14] This is the additional sales tax which petitioners admit they were unable to locate. Pet. 23 n.16.

[15] Petitioners read far too much into this Court's statement in *Sac and Fox* that Oklahoma's excise tax is "imposed in addition to a sales tax." 508 U.S. at 127. This statement could only mean that Oklahoma's excise tax is separate and distinct from its general sales tax. This Court nowhere suggested that vehicle owners in Oklahoma were required to pay both an excise tax and a sales tax. Oklahoma's excise tax statute and its general sales tax statute, both of which were before this Court in *Sac and Fox*, are clear: motor vehicles purchased in Oklahoma are subject to the excise tax, not the sales tax. Okla. Stat. Tit. 68, §§ 1355, 2106.

Finally, petitioners argue that *Sac and Fox* can be distinguished because, in that case, it was the manner in which Oklahoma collected its excise tax from Sac and Fox members, as opposed to the nature of the tax itself, that "compelled" this Court to conclude that the excise tax was an unlawful property tax. Pet. 23. This is nonsense.

In *Sac and Fox*, Oklahoma assessed its excise tax against all tribal members who owned motor vehicles and operated them in the state. 508 U.S. 119-20. Tribal members who registered their vehicles with the Sac and Fox Nation and, thus, did not pay the state excise were considered "to be delinquent with regard to the state taxes." *Id.* The State did not attempt to collect the taxes from tribal members until they sold their vehicles to non-members, *id.* at 120, but this fact was irrelevant in this Court's eyes. (The State eventually collected the "delinquent excise taxes," *id.*, from non-member purchasers.) What mattered to this Court was that the excise tax was assessed for periods when vehicles were owned by tribal members living in Indian country. *Id.* This, the Court would not permit.

Petitioners ignore this Court's clear rule that states may not impose property taxes on tribal members living in Indian country, no matter when or how they attempt to collect those taxes.

II. Petitioners' Sales Tax Argument Is A Thinly-Veiled Attempt To Circumvent Established Precedent.

South Dakota recognizes that it is a "bedrock Indian law preemption principle[]" that "congressional consent is necessary before the legal incidence of a tax may be imposed on a Tribe or its members as to transactions occurring on Indian Country set aside for their benefit." *Amicus* Brief of

South Dakota, *et al.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (No. 94-771) (1995). In an effort to circumvent this "bedrock principle," petitioners argue that the State's motor vehicle excise tax functions like a sales tax and, accordingly, it may be applied to off-reservation vehicle purchases by tribal members. Pet. 16, 28. This is a veiled plea for this Court to rewrite the state tax laws to transform an unlawful excise tax into a sales tax.

In *Sac and Fox*, this Court rejected an identical plea with respect to an identical motor vehicle excise tax. 508 U.S. at 126. There, the Oklahoma Tax Commission argued that Oklahoma's excise tax "closely resemble[d] a sales tax," and, as such, could be imposed on "the purchase of a car by an Indian" outside Indian country. Brief on the Merits by Petitioner, *Sac and Fox*, 508 U.S. 114 (S.Ct. No. 92-259) at 21. The Tenth Circuit Court of Appeals had rejected this argument, finding it to be a transparent "attempt to circumvent established precedent." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1430 (10th Cir. 1992). This Court agreed, ruling that the excise tax was not a sales tax since it "'is not enforced as a sales tax against Sac and Fox purchasers,' and by its terms is imposed on both the transfer and use of any vehicle in the State." 508 U.S. at 126, *quoting Sac and Fox Nation*, 967 F.2d at 1430.

South Dakota's excise tax is identical in all relevant respects to Oklahoma excise tax struck down in *Sac and Fox*. Just as it did in *Sac and Fox*, this Court should reject the State's characterization of its excise tax as a sales tax.

A. South Dakota's Excise Tax Is Not A Sales Tax.

The plain language of South Dakota's motor vehicle excise tax statute is clear: the excise tax is not a sales tax,

but rather a levy "*in lieu of*" a sales tax. S.D. Codified Laws Ann. § 32-5B-1 (emphasis added).[16]

The excise tax does not operate like a tax on motor vehicle sales transactions in the state. It is not assessed against all persons who purchase motor vehicles in the state, but only against state residents who register their vehicles in the state, S.D. Codified Laws Ann. § 32-5B-1; or who apply for state vehicle titles, *id.* at § 32-5B-14. Non-residents who purchase vehicles in the state do not pay the tax. Neither do residents who purchase vehicles in the state, but do not register them or apply for title. Conversely, the excise tax does apply to "vehicles purchased by South Dakota residents outside of the state and to certain vehicles not recently purchased, but recently brought into the state." App. 11. The tax also applies to transfers and acquisitions of motor vehicles other than sales.[17]

The taxable event of the excise tax is not the purchase or sale of a vehicle in the state, but rather the ownership of a vehicle by a state resident (whether the vehicle is acquired by purchase, gift, other transfer, or manufacture) and registration of the vehicle or application for title by the resident.

Despite the *post hoc* rationalizations of its advocates,

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[16] "In lieu of" means "instead of" or "in place of," BLACK'S LAW DICTIONARY 787 (6th ed. 1990), not "the same as," as petitioners seem to argue.

[17] For example, vehicles "acquired by gift or other transfer for no or nominal consideration" are subject to the tax. S.D. Codified Laws Ann. § 32-5B-4(4). A motor vehicle "manufactured by the same person who registers it" is also subject to the tax. *Id.* at § 32-5B-4(5).

South Dakota has never treated its motor vehicle excise tax like a sales tax. If it had, it would have granted an exemption to tribal members who purchase their vehicles on the reservation. Indeed, the State readily concedes that it may not tax on-reservation vehicle sales to tribal members, *See* Pet. 28; S.D. Codified Laws Ann. § 10-12A-1, *et seq*, yet it has never granted an exemption for such sales transactions. Similarly, had the State treated the excise tax like a sales tax, it would have included the tax in its comprehensive sales tax collection agreement with the Cheyenne River Sioux Tribe.[18] No motor vehicle tax has ever been included in that agreement.

B. South Dakota's Excise Tax Is Not A "Combined" Sales And Use Tax.

Petitioners *concede* that South Dakota's excise tax does not function like a sales tax. *See*, *e.g.*, Pet. 25-28. To overcome the obstacle this concession poses for their sales tax argument, they characterize the tax as a "sales and use tax combined in one statute." Pet. 28. Through this self-serving definition of the state statute, petitioners argue that the excise tax possesses a use tax component and a separate sales tax component which may be imposed on off-reservation vehicle sales to tribal members. *Id.* at 28. This is nonsense.

The excise tax is not a combined sales and use tax, but rather a one-time "tax on the ownership of a motor vehicle" by state residents. App. 13. It is no different than the excise tax struck down in *Sac and Fox*, App. at 12-13,

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[18] Under this agreement, in place since 1976, the State collects all state and tribal sales taxes from Indians and non-Indians on the reservation and remits a percentage to the Tribe. C.R.S.T. App. No. 34 at 4.

and, accordingly, it may not be imposed on tribal members living in Indian country.

While it is true that the excise tax may bring about the same result as a sales tax in some circumstances, "such as when a new or used car is purchased from a licensed dealer in South Dakota and registered there by the new owner," App. 10, this alone does not transform the excise tax into a sales tax or a combined sales and use tax. Similarly, although the excise tax may resemble a use tax in some instances, this does not mean that it is in fact a use tax, in whole or in part. Many distinct taxes yield common results under certain circumstances.[19]

Indeed, no authority exists to support petitioners' argument that a supposed "combined" tax which coincidentally resembles a sales tax in a few, but not all, applications, should be treated as if it were, in fact, a sales tax when determining the tax immunity of Indian tribal members. This Court refused to reach such a result when confronted with an identical motor vehicle excise tax in *Sac and Fox*.

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[19] The fact that different taxes may, in certain circumstances, bring about the same result does not mean that the taxes are the same. For example, in *McLeod v. J.E. Dilworth*, 322 U.S. 327, 330-31 (1944), this Court stated that although "[a] sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds." *Accord Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 343 (1954) ("[t]axation of sales or purchases and taxation of use or possession are complementary and related," but the taxes are legally distinct and "serve very different purposes"); *State v. Dorhout*, 513 N.W.2d 390, 392-93 (S.D. 1994) (sales taxes and use taxes are distinct assessments on different transactions).

Petitioners ask this Court to rewrite the State's tax laws, transforming its excise tax into distinct and severable sales and use taxes, so that the State may continue to tax Indians who purchase vehicles off the reservation. It is not the business of this or any other federal court to tailor or reformulate state tax laws in order to safeguard state taxation of Indians. *See*, *e.g.*, *Colville*, 447 U.S. at 163-64 (refusing to tailor state excise tax to amount of actual off-reservation use); *Sac and Fox*, 508 U.S. at 127-28 (same). If the State wants to change its tax laws, it is free to do so. "But it has not done so, and [this Court should] decline to treat the case as if it had." *Id.*

III. The Eighth Circuit's Decision Does Not Create A Split Among The Circuits.

Petitioners assert that the Eighth Circuit's decision in this case "squarely conflicts" with *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992). *Tunica-Biloxi* has never been followed by another circuit court and was, in any event, *decided a year before this Court established the prevailing view in* Sac and Fox. Petitioners' attempt to conjure a circuit conflict is, therefore, a little behind the times. The Eighth Circuit's decision follows, and is wholly consistent with, *Sac and Fox*. There is no conflict among the circuit courts over the correct interpretation of *Sac and Fox*.

In any event, the Eighth Circuit's decision and *Tunica-Biloxi* do not "squarely conflict" because the two cases construed fundamentally different tax statutes. In *Tunica-Biloxi*, the Fifth Circuit upheld Louisiana's retail sales tax as applied to off-reservation vehicle sales to a Tribe and its members. 964 F.2d at 1542. Louisiana's retail sales tax is materially different from the South Dakota tax. The taxable event of Louisiana's retail sales tax is "sales transac-

tion" itself, 964 F.2d at 1541, not ownership and registration by state residents, as in South Dakota. Unlike South Dakota's excise tax, Louisiana's retail sales tax applies to vehicles purchased in the state by residents who never register them and it also applies, in many instances, to vehicles purchased by non-residents for use in another state altogether.[20] La. Rev. Stat. § 302.A(1). Unlike the excise tax in South Dakota, Louisiana's retail sales tax does not apply to vehicles purchased in other states or to transfers or acquisitions other than sales.[21]

IV. The Eighth Circuit's Decision Does Not Have National Impact.

In an attempt to alarm this Court, petitioners assert that the decision below "has potential national impact." Pet. 29. Yet, in the same breath, they concede that the decision

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[20] Louisiana exempts certain "property purchased for first use outside the state" from its retail sales tax. La. Rev. Stat. § 305.10(A). Contrary to petitioners' assertions, Pet. 19, this exemption is not a blanket exemption; rather, it applies only under certain circumstances carefully defined by statute, *id.* at § 305.10(B)-(G), and regulation, *see id.* at § 305.10(H).

[21] In order to manufacture a conflict with *Tunica-Biloxi*, petitioners ask this Court to compare South Dakota's excise tax not just to Louisiana's retail sales tax, but also to a state use tax statute that was not before the court in *Tunica*. *See* La. Rev. Stat. § 302.A(2). According to petitioners, "the entire tax schemes of both states should be analyzed." Pet. 16. This makes no sense. Louisiana's use tax was not before the court in *Tunica-Biloxi*, and the Fifth Circuit expressly declined to treat the State's sales and use taxes as a single, combined tax. 964 F.2d at 1540-41. Instead, the court noted that the State's sales and use taxes were distinct and that different legal consequences attached to each. *Id.* The court upheld the retail sales tax, but suggested that a different result might obtain with respect to the use tax. 964 F.2d at 1540-41.

could impact only the "practices of every [other] state in the . . . Circuit." *Id.* That, of course, is true of every decision of a circuit court and hardly constitutes the level of national importance necessary to invoke this Court's jurisdiction. The effect of the decision below on other states in the Eighth Circuit is an issue for the Eighth Circuit to decide, which it did by ruling against petitioners and denying their request for rehearing *en banc*.

At any rate, the decision below will not, in fact, adversely impact the other states in the Eighth Circuit. Petitioners' assumption that these states have motor vehicle tax statutes that "function the same as in South Dakota," Pet. 29, is not well-founded.[22] Moreover, it is not clear that any state in the circuit, other than South Dakota, taxes vehicles owned by Indians living in Indian country.[23]

CONCLUSION

The petition for writ of certiorari should be denied.

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[22] The tax practices of these states were not before the courts below, but it appears that, unlike South Dakota, some of these states have separate statutes that impose distinct sales and use taxes on motor vehicles. *See, e.g.*, Iowa Code Ann. §§ 422.43 (sales tax), 432.7 (use tax); Ark. Code Ann. §§ 26-52-301 (gross receipts tax), 26-53-106 (use tax); Neb. Rev. Stat. §§ 2703(1)(i) (sales tax), 2703(2) (use tax); Mo. Rev. Stat. §§ 144.070 (sales tax), 144.440 (use tax).

[23] For example, Minnesota recognizes tribally-issued license plates and, thus, does not require tribal members to register their vehicles with the state or pay state motor vehicle taxes. *See Red Lake Band of Chippewa Indians v. Minnesota*, 248 N.W.2d 722 (Minn. 1976).

Respectfully submitted,

Steven C. Emery*
Tribal Attorney General
Thomas J. Van Norman
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-6687
**Counsel of Record*

Steven J. Gunn
Indian Law Resource Center
601 E Street, SE
Washington, D.C. 20003
(202) 547-2800

Brian Koukoutchos
9 Avon Road
Bedford, MA 01730
(617) 275-4900
Of Counsel

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